

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

FILED

DEC 16 2002

INDIANA UTILITY  
REGULATORY COMMISSION

CAUSE NO. 41657

IN THE MATTER OF THE PETITION OF INDIANA }  
BELL TELEPHONE COMPANY, INCORPORATED, }  
D/B/A AMERITECH INDIANA PURSUANT TO }  
I.C. 8-1-2-61 FOR A THREE-PHASE PROCESS }  
FOR COMMISSION REVIEW OF VARIOUS }  
SUBMISSIONS OF AMERITECH INDIANA TO }  
SHOW COMPLIANCE WITH SECTION 271(c) OF }  
THE TELECOMMUNICATIONS ACT OF 1996 }

**RESPONSE OF INDIANA CLECS TO AMERITECH’S MOTION TO MODIFY ORDER  
ADOPTING PERFORMANCE ASSURANCE AND REMEDY PLAN  
BY STAYING ITS IMPLEMENTATION PENDING JUDICIAL REVIEW**

AT&T Communications of Indiana, GP. (“AT&T”), on behalf of itself and its affiliate TCG Indianapolis (“TCG”), WorldCom, Inc., and McLeodUSA (“Indiana CLECs”), by their counsel, respectfully respond to Ameritech Indiana’s “Motion to Modify Order Adopting Performance Assurance and Remedy Plan by Staying its Implementation Pending Judicial Review.” For the reasons stated herein, the Indiana CLECs request that the Indiana Utility Regulatory Commission (“Commission”) deny Ameritech’s requested relief in its entirety.

**I. ARGUMENT**

The ink on Ameritech’s various filings supporting its prior request for reconsideration and a stay of the Commission’s October 16, 2002 Remedy Plan Order are hardly dry and the Company now makes yet another plea for a stay. Ameritech has not even bothered to wait for a Commission ruling on its November 6<sup>th</sup> filings prior to making this new request.

This most recent stay request is, however, slightly different. Rather than seeking a stay pending Commission adjudication of its request for rehearing, Ameritech now seeks an indefinite stay of the Commission’s October 16, 2002 Order. Ameritech’s unprecedented stay request is

indefinite in duration because the motion extends to the completion of both its federal court appeal *and* its state court appeal. (Ameritech Motion, p. 1).

The motivation underlying Ameritech's stay request is obvious. If the Commission grants Ameritech's December 6<sup>th</sup> stay request, and assuming the federal court finds Ameritech's appeal meritless, the stay would still remain in place even after the exhaustion of that federal appeal, and continue to remain in effect until after Ameritech's state court appeal is fully and finally adjudicated. Given the many years over which Ameritech could drag out these appeals,<sup>1</sup> granting Ameritech's motion would literally mean that Indiana would be without a remedy plan during the crucial first years after obtaining Section 271 authority. The Indiana CLECs urge the Commission to reject Ameritech's stay request for this reason alone.

Ameritech's latest plea for stay also highlights a major contradiction in its allegations in this proceeding. The asserted bases for Ameritech's December 6<sup>th</sup> motion contradict its claims in the rest of this proceeding – namely, Ameritech has alleged under oath that its OSS are functioning well and present no impediment to the approval of its Section 271 application. (*See, e.g.*, September 26, 2002 Affidavits of Ameritech affiants Cottrell, Brown, Foster, and Kagan; *see also* Ameritech Indiana's Draft Brief in Support of its Section 271 Application at pp. 20-40). Yet here, Ameritech claims that it will be harmed if required to comply with and make the payments required under the Commission-ordered remedy plan while its appeals are pending. (Ameritech Stay Motion at 9).

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<sup>1</sup> This is not mere speculation. As the Commission is aware, Ameritech appealed to both state and federal court the Commission's 1999 ruling in Cause No. 41097. In Cause No. 41097, the Commission ruled that Time Warner was entitled to reciprocal compensation for Ameritech customer calls to Time Warner's internet service provider customers. Ameritech first took this case to federal court. This appeal was unsuccessful because of a determinative ruling in an identical Illinois case. *See, Illinois Bell Telephone Co. v. WorldCom*, 179 F. 3d 566 (7<sup>th</sup> Cir. 1999). The state court version of this appeal is now in progress, with briefing not expected to end until sometime in 2003. *See, Indiana Bell Telephone Co. v. Time Warner*, Cause No. 93A02-9907-EX-00460 (Indiana Court of Appeals). A stay in effect in that case would therefore have deprived Time Warner of its money for almost four years, with the end of the appellate process nowhere on the horizon.

Ameritech must decide whether it intends to claim that its OSS function as swimmingly as it claims in its pursuit of 271 authority – in which case its application for stay is baseless because Ameritech cannot demonstrate harm in the form of the costs of complying with the remedy plan; or whether Ameritech contends that it will be required to expend such sums under the remedy plan due to OSS performance failures that it will be harmed to such a degree that it needs the protection of a stay – in which case, its OSS are plainly not operating properly and 271 approval is inappropriate.

Ameritech cannot have it both ways, and if it intends to pursue its motion for stay, then the Commission should stay this entire proceeding, because Ameritech's OSS are not up to the challenge and Ameritech cannot demonstrate checklist compliance. Furthermore, no 271 application has ever been granted without a remedy plan in place. This Commission needs to send Ameritech the message that the Company is accountable for its tactical advocacy, and if Ameritech's chosen tactic here is to frustrate and delay the implementation of the Commission-ordered remedy plan, the price is the delay of its Section 271 application. Since Ameritech is likely unwilling to accept this result, the Commission should deny Ameritech's motion for stay.

The Commission, however, has many other reasons to reject Ameritech's stay request. Because the arguments in Ameritech's filing are to a great extent duplicative with its earlier stay and rehearing requests, the Indiana CLECs hereby incorporate by reference their prior response to Ameritech's first stay request.<sup>2</sup> The Indiana CLECs will therefore not repeat their earlier arguments to the extent they apply to this latest stay request, and instead refer the Commission to the earlier pleadings.

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<sup>2</sup> See, "Response of Indiana CLECs To Ameritech's Petition For Reconsideration and Petition To Modify and Stay Order" ("November 18 Response"), and the attached Affidavit of Karen W. Moore, both filed with the Commission on November 18, 2002.

Unlike its first stay request, where Ameritech failed to even try to assert that it met the standard for a stay, here the Company at least contends that it meets its burden. As is discussed below, however, Ameritech fails to meet any of the applicable standards. Ameritech's request for a stay should therefore be denied.

**A. Ameritech Does Not Have a Reasonable Likelihood of Success in its Appeals**

Ameritech makes four arguments supporting its contention that a stay should be granted because it has a substantial likelihood of success on appeal. As is discussed below, and also in more detail in the Indiana CLECs' earlier opposition to Ameritech's (still pending) stay and rehearing requests, Ameritech does not have a reasonable likelihood of success on its appeal, and for this reason alone its stay request should be denied.

Ameritech first asserts that Section 271 confers no authority to order a remedy plan with which the applicant does not agree. (Ameritech Stay Motion, pp. 5-6). Ameritech is wrong as a matter of law. First and most importantly, the Commission's Performance Assurance Plan was ordered pursuant to its jurisdiction arising under federal law, specifically Section 271 of the Act.<sup>3</sup> The Commission also correctly ruled that the FCC has developed a significant role for state commissions in 271 proceedings.<sup>4</sup>

Specifically, state commissions have an essential role as the delegated creator of the initial record upon which the FCC's review of a BOC's [Bell Operating Company] compliance with the Section 271 checklist will be based. Furthermore, "where the state has conducted an exhaustive and rigorous investigation into the BOC's compliance with the checklist, we [the FCC] may give evidence submitted by the state commission substantial weight in making our

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<sup>3</sup> See, Order on Performance Assurance Plan, p. 3.

<sup>4</sup> *Id.*

decision.”<sup>5</sup> With respect to performance assurance plans, the FCC has stated “the existence of a satisfactory performance monitoring and enforcement mechanism is probative evidence that the BOC will continue to meet its 271 obligations after a grant of such authority.”<sup>6</sup>

Moreover, *every* state utility commission in other states for which Section 271 authority has been granted for a Bell company has established a remedy plan for the particular Bell Operating Company. The FCC stated in its decision granting Section 271 authorization to BellSouth in Georgia and Louisiana:

We have not mandated any particular penalty structure, and we recognize different structures can be equally effective. We also recognize that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We note that both the Georgia and Louisiana Commissions anticipate modifications to BellSouth's SQM from their respective pending six-month reviews. We anticipate that these state Commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect actual commercial performance in the local marketplace.<sup>7</sup>

Ameritech is therefore incorrect as a matter of federal law. The Commission has the same legal authority as every other state to establish a performance assurance plan.

Ameritech also asserts that the Commission has no authority to impose a materially different Section 271 remedy plan than what Ameritech proposes, especially if the Commission-ordered plan

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<sup>5</sup> Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Services in the State of New York, CC Docket 99-295, released December 22, 1999.

<sup>6</sup> Joint Application by BellSouth Corporation, BellSouth Communications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA services in Georgia and Louisiana, CC Docket 02-35, released May 15, 2002 (“Georgia-Louisiana 271 Order”).

<sup>7</sup> Georgia-Louisiana 271 Order, ¶294. (Footnotes omitted).

“imposes payments to which a party has *not* agreed.” (Ameritech Stay Motion, pp. 5-6). This assertion is incorrect because the Commission’s Plan uses Ameritech’s own proposed cap on payments, so Ameritech indeed agreed (at least until now) to the levels of payments that are possible under the Commission’s order. In any event, Ameritech is wrong in its analysis of the law; nothing in state or federal law ties the Commission’s hands to ordering a remedy plan that Ameritech can “blackball.” Indeed, no FCC Section 271 decision has ever addressed this theory.

Ameritech’s second contention supporting its request is the novel theory that the remedy plan somehow violates federal law because it took effect prior to approval of its Section 271 application. (Ameritech Stay Motion, p. 7). Ameritech’s own actions, however, are directly inconsistent with this assertion: implementation is immediate for its own various “compromise” remedy plan proposals, including its “last second” October 16, 2002 proposal *in this very case*.<sup>8</sup> Moreover, Ameritech Michigan’s remedy plan has been in operation for over a year, yet Section 271 authorization has not yet occurred in Michigan either.<sup>9</sup> Thus, by making implementation immediate, the Commission merely adopted Ameritech’s own recommendation. Ameritech’s disingenuous argument should be rejected.

Ameritech’s third argument is that the Commission lacked the authority to impose the remedy plan because the Act occupies the field and preempts the Commission's authority to regulate in this area. (Ameritech Stay Motion, p. 7). The Indiana CLECs point the Commission to their November 18 Response, pages 17-22 for a detailed rebuttal to this contention.

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<sup>8</sup> See, *Amendment to Interconnection Agreement By and Between Ameritech Indiana and Time Warner Telecom of Indiana, L.P.*, paragraph 4, which provides: “This Amendment shall be filed with and is subject to approval by the Indiana Utilities Regulatory Commission (IN-URC) and shall become effective (10) days following approval by the IN-URC. The Parties agree to implement the Remedy Plan described in this Amendment so that the initial measurement month from which performance data is collected begins the first full month after the IN-URC approves this Amendment.” This unsigned document was attached to a pleading entitled: “Motion Of Ameritech Indiana For The Commission To Receive And Consider Additional Information Regarding Performance Remedy Plan Prior To Entry Of An Order”, filed on October 16, 2002.

<sup>9</sup> See, Michigan Public Service Commission Case No. U-11830.

Ameritech's fourth argument is the Commission lacks the jurisdiction under state law to implement a performance remedy plan. The Indiana CLECs previously rebutted this theory, and refer the Commission to their November 18 Response, pages 15-16.

Ameritech therefore has not shown that it has a reasonable likelihood of success on the merits. In fact, Ameritech is unlikely to prevail on appeal. For this reason alone, Ameritech's request for a stay should be denied.

**B. Ameritech is Not Harmed By The Indiana Remedy Plan**

Ameritech contends that the Commission's Remedy Plan will harm the company. (Ameritech Stay Motion, pp. 9-11). Ameritech, however, is incorrect. Ameritech will not suffer harm under the Indiana Remedy Plan.

The Indiana CLECs again call attention to Ameritech's own allegations in this proceeding that its OSS are working well. Without conceding this (indeed, the Indiana CLECs have disputed it in their December 11<sup>th</sup> filings), Ameritech is bound by its own representations in its other pleadings in this case, which indicate that any payments due under the Commission-ordered plan would be very miniscule, and certainly not rising to the level of harm to a company with a market capitalization of almost \$85.3 billion.<sup>10</sup>

Ameritech contends that implementing the Commission's remedy plan somehow results in all sorts of new costs, and this constitutes harm. (Ameritech Stay Motion, p. 9). The Indiana CLECs previously rebutted this argument, and refer the Commission to their November 18 Response, pp. 5-13, and the attached Affidavit of Karen W. Moore. As those previous filings

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<sup>10</sup> See <http://finance.yahoo.com/q?s=sbc&d=c>.

show, Ameritech is not harmed by adoption of a remedy plan that is modeled after the Company's own proposal, including retention of the same annual cap on remedies.

It is also irrefutable that harm does not occur when the Commission adopts Ameritech's own proposed 36% cap on payments. Indeed, the FCC has previously found proper a remedy amounting to 36% of all local revenue.<sup>11</sup> It also does not occur for the simple reason that the payments are not mandatory. All Ameritech need do is satisfy its own proposed performance standards; if this happens, as Ameritech claims under oath that it does in its draft checklist filing, the Company pays no remedies whatsoever. Further, based on Ameritech's sworn statements regarding the quality of its OSS, any payments due under the Commission-ordered plan would have to be very small, and could not rise to the level of harm.

### **C. The Balance of Harm Between the Parties Does Not Support Ameritech**

Ameritech also fails in its efforts to show that granting the stay is necessary because the balance of harm favors the Company. Granting the stay will clearly harm the Indiana CLECs and the public interest far more than any harm accruing to Ameritech. Without a remedy plan, there are no adequate assurances of compliance with Ameritech's continuing obligations to its wholesale customers. Thus, staying the remedy plan will harm the CLECs and their customers. This is because absent enforcement of a rigorous remedy plan, Ameritech will have no incentive to offer adequate service to CLECs. It will also harm the Indiana public, since the CLECs' end-user customers will ultimately suffer the impact of Ameritech's poor performance.

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<sup>11</sup> *In re Section 271 Application of Bell Atlantic New York to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, 15 F.C.C.R. 3953 (Dec. 22, 1999), *aff'd*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) ("NY Order") at ¶¶ 434-36.

The lack of such an incentive is, indeed, a real threat to competition, given Ameritech's efforts (and those of its parent SBC) in Washington to eliminate residential and small business competition via the UNE Platform ("UNE-P"). Ameritech and SBC seek to (1) eliminate broadband unbundling requirements, (2) eliminate the switching UNE; (3) eliminate the UNE-P as an offering, (4) if UNE-P is not eliminated, dramatically increase rates by altering the TELRIC pricing and costing methodology, and (5) "preempt" the existing rights of Indiana and other states under federal law to call for additional UNE availability and greater competition than allowed by the FCC. (*See* Reply Comments of SBC, July 18, 2002, FCC Docket Nos. 01-338, 86-98, 98-147).

The Commission is also undoubtedly aware of Ameritech's incessant media campaign seeking an elimination of local competition via UNE-P. Moreover, recent events demonstrate that Ameritech is willing to cross any line in its effort to hijack the Act to eliminate competitive choice. SBC/Ameritech has even been willing to exploit the troubles at WorldCom as a means to evade SBC/Ameritech's wholesale obligations. SBC has gone so far as to claim that the primary culprit of WorldCom's current difficulties is the availability of UNE-P.<sup>12</sup>

Elimination of a robust remedy plan will play right into Ameritech's clear incentive to eliminate local competition served via UNE-P because the Company will have no incentive to offer adequate wholesale services to CLECs. Thus, Ameritech's stay request should be denied as the balance the balance of harm from granting the stay is far greater than if the Plan remains in effect.

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<sup>12</sup> *See* SBC Cites WorldCom's Woes in Push for Deregulation, TR Daily, June 28, 2002.

**D. A Stay Pending Judicial Review Will Harm the Public Interest**

Ameritech argues that a stay should be granted because it will not harm the public interest. Ameritech's primary argument in support of this request is nothing more than a reiteration of its same arguments previously offered on other topics. (Ameritech Stay Motion, pp. 11-12). Because these contentions are nothing new, the Indiana CLECs therefore refer the Commission to their November 18 Response, Ms. Moore's affidavit, and the body of this pleading, where it is shown that Ameritech's arguments are wrong as a matter of law, fact and public policy, and a stay should not be granted.

Ameritech's bald assertion that the absence of the sole enforcement mechanism to guarantee acceptable wholesale service quality -- which directly impacts not only Ameritech's competitors and their reputations in the marketplace, but in turn, the quality of the services provided to the Indiana public -- is acceptable is plainly untrue. Clearly the public interest far outweighs the negligible impact to Ameritech of not staying the remedy plan in the wake of Ameritech's contradictory cries of injury.

**E. Ameritech's Request to Not File a Bond**

Ameritech finally asserts the Company should not be required to file a bond as a condition of obtaining a stay. Ameritech offers no authority for making this remarkable request, and indeed, there is none. IC 4-21.5-5-9 (2) clearly requires the posting of bond in conjunction with a stay of administrative order pending judicial review.

The easiest way to dispose of Ameritech's desire to not file a bond is for the Commission to reject Ameritech's motion for a stay, which makes its request for waiving this requirement moot. In the event that the Commission were inclined to grant a stay, it should be aware that Ameritech, in a similar stay appeal of the Illinois remedy plan order, stated: "Ameritech Illinois

is willing to post and maintain a bond for the amount of any payments or penalties that would accrue under the Condition 30 Remedy Plan after October 8, 2002, to ensure that any Condition 30 payments are ultimately paid".<sup>13</sup>

In any event, in the unlikely event that the Commission would even entertain a stay, the Commission should reject Ameritech's request for a waiver of its requirement to file a bond. Aside from the issue that it is a statutory requirement, if Ameritech has so little faith in the performance of its OSS and its chances on the merits that it seeks to skirt this important protective mechanism, then it should not be making this application, because the remedy plan is all the more necessary. The Indiana CLECs submit that Ameritech's reluctance to post bond is indicative of the company's view of the merits of its motion, and is further reason to deny both its request not to require the posting of bond, and its motion overall.

## II. CONCLUSION

Ameritech's request for a stay fails to meet any of the standards for granting a stay established by Indiana law. Hence, Ameritech's request for a stay should be denied.

Dated: December 16, 2002

Respectfully submitted,

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<sup>13</sup> See, Ameritech Illinois' Motion for Stay of the Order on Reopening, p. 2, filed in Illinois Commerce Commission Docket No. 01-0120 (October 31, 2002).

**WORLDCOM, INC.**

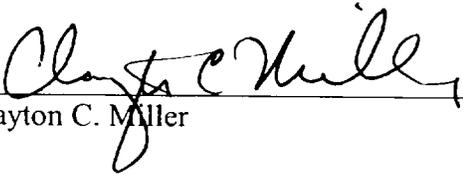
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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Response of Indiana CLECs was served by electronic mail to the list serve maintained by the Indiana Utility Regulatory Commission, Ameritech271@urc.state.in.us, in this Cause, on the 16<sup>th</sup> day of December, 2002.

  
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Clayton C. Miller